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7 JOSEPH JAMES GREER,
8 Plaintiff,
9 v.
10 CITY OF HAYWARD,
11 Defendant.

12 Case No. [3:15-cv-02307-WHO](#)

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14 **ORDER GRANTING DEFENDANTS'**
MOTION FOR SUMMARY JUDGMENT

15 Re: Dkt. No. 59

16
17 **INTRODUCTION**

18 This is a tragic case. James Greer was pulled over by a Hayward police officer on the
19 evening of May 23, 2014 for suspicion of driving under the influence. He was dead an hour later,
20 after a scuffle with several Hayward Police Department ("HPD") officers, and one officer,
21 Sergeant Jon Tougas, from the Bay Area Rapid Transit District ("BART"). Tougas recorded the
22 encounter on his BART-issued body camera ("bodycam"). Greer's son, the plaintiff, brought this
23 action against the City of Hayward, BART, Tougas, and each of the involved HPD officers
24 alleging 42 U.S.C § 1983 claims for violation of the Fourth and Fourteenth amendments to the
25 Constitution of the United States and for wrongful death under state law.¹

26 Before the court is BART and Tougas's motion for summary judgment.² Tougas's video
27 raises genuine disputes of material fact regarding his conduct and whether he violated clearly
28 established law. He is not entitled to qualified immunity or summary judgment on the excessive
force-related claims. But he was not deliberately indifferent under the law to Greer's medical

¹ Given the similarities of their names, the decedent (James Greer) is referred to as "Greer" in this Order and his son (Joseph James Greer) as "plaintiff."

² The claims against the City of Hayward and its officers are now resolved.

1 needs and the defendants are entitled to summary judgment on that claim. Since plaintiff offers no
2 evidence of a pattern or practice by BART, the *Monell* claim fails as well.

3 BACKGROUND

4 I. FACTUAL BACKGROUND

5 The BART bodycam video lasts approximately 16 minutes. Cajina Decl. Ex. 3³ and Ex. 2
6 (Tougas Dep.) at 6:25–7:24. Given that the bodycam footage documented the entire interaction,
7 many of the facts are undisputed.

8 A. The Traffic Stop

9 On May 23, 2014 at approximately 10:43 p.m., HPD officer Lieutenant Lutzinger
10 attempted to initiate a traffic stop after twice observing Greer proceed straight from a left turn
11 lane. Rooney Decl. Ex. A, Lutzinger Dep. 38:14–40:6 (Dkt. No. 59-2). Greer initially came to a
12 stop in the lane furthest to the left, but when Lutzinger began to exit his patrol car, Greer drove
13 away. *Id.* at 40:15–41:1. He was not driving fast but “casually driving away.” *Id.* at 41:5–7.
14 Lutzinger followed Greer who eventually came to a stop in a K-Mart parking lot. *Id.* at 41:16–24.
15 Lutzinger radioed for backup, exited his vehicle and directed Greer to turn the engine off and drop
16 the keys from the window or place them on the roof of the vehicle. *Id.* at 44:1–15, 47:11–17.
17 Greer did not immediately comply, but rather began questioning, “Why are you stopping me?
18 What are you picking on me for? What do you need? What do you want?” *Id.* at 44:17–21,
19 47:11–17. After about 10–15 seconds, Greer complied and put the keys on the roof. *Id.* at 47:18–
20 20, 48:4–9.

21 Based on Greer’s driving maneuvers and repeated questioning, Lutzinger suspected Greer

23 ³ The DVD containing the Tougas bodycam footage also contains footage from two other BART
24 officers who arrived to the scene after the encounter concluded, as well as audio recordings of the
25 dispatch tapes. Opp’n at 3. BART and Tougas argue that plaintiff’s exhibit 3 submitting the body
26 camera video as evidence contains inadmissible hearsay and unauthenticated videos. Reply at 4.
27 Defendants object to plaintiff’s submission of the following: (1) video entitled
28 “J_Mateu_58035_Cover_Unit_1.mp4;” (2) the “Cover.MP4” video; and (3) the “combined video”
synchronizing the three videos. *Id.* Because the compiled videos are not authenticated,
defendants’ objections are SUSTAINED. I will only consider the video footage from Tougas’s
body camera, but because plaintiff cites to the combined video footage throughout his opposition,
those citations will be included.

1 of driving under the influence. Lutzinger Dep. 48:17–24. He observed Greer “fumbling”⁴ to
2 retrieve his driver’s license, his face was flushed, his eyes were glassy, and he was “not incoherent
3 – but having difficulty … following train of thought.” *Id.* at 49:2–49:10. Lutzinger planned to
4 conduct a field sobriety test, but wanted to wait for another officer to arrive. *Id.* at 51:5–14. He
5 instructed Greer to “wait there and [he] would be back,” and he waited in his patrol car for another
6 officer to arrive. *Id.*

7 BART officer Sergeant Jon Tougas was traveling back to his police office in Hayward
8 when he passed the K-Mart parking lot and saw the lone HPD officer and Greer’s truck stopped.
9 Rooney Decl. Ex. B, Tougas Dep. 32:9–14 (Dkt. No. 59-2). Tougas pulled into the parking lot
10 and asked Lutzinger if he needed assistance, to which Lutzinger responded affirmatively.
11 Lutzinger Dep. 51:25–52:24; Tougas Dep. 32:9–14, 37:19–38:15. Tougas told Lutzinger that if he
12 remained on scene, he would have to turn his camera on. Tougas Dep. 38:5. Lutzinger responded,
13 “Go ahead,” Tougas Dep. 38:6, and informed Tougas that Greer was “argumentative and a very
14 large guy,” Lutzinger Dep. 52:22–23, but noted that he had not been physically combative. *Id.* at
15 51:3–53:6. Soon after, two HPD officers, Clark and Lewandowski, arrived on the scene. *Id.* at
16 54:16–18; Lewandowski Dep. 26:13–27:22.

17 **B. The Field Sobriety Tests**

18 Lutzinger led the officers back to Greer’s truck and asked Greer to step out of the car.
19 Lutzinger Dep. at 58:14–59:2. Greer complied but repeatedly questioned “Why? What’s going
20 on? What are you doing?” *Id.* at 59:4–7. Lutzinger explained that he wanted to evaluate Greer’s
21 intoxication and asked if he had any weapons on him. *Id.* at 59:23–25. Officers Lutzinger and
22 Clark conducted a pat down and recovered a pocket knife. *Id.* at 62:2–15. Lutzinger then
23 administered a horizontal gaze Nystagmus test, found that Greer had trouble following the
24 instructions, and concluded that additional field sobriety tests were necessary. *Id.* at 64:18–65:22,
25 66:2–67:8. He directed Greer to move to more level ground on the passenger’s side of the vehicle
26 so that he could conduct balance tests. *Id.* at 71:17–20. Greer obeyed Lutzinger’s orders,
27

28

⁴ Plaintiff disputes whether Greer fumbled for his license. Opp’n at 4.

1 Lewandowski Dep. 42:6–22, and answered affirmatively when Lutzinger asked if he had any
2 problems with his legs. Cajina Decl. Ex. 7 (Transcript of bodycam footage)(Dkt. No. 62-1) at
3 3:4–26.

4 Once on the passenger’s side of the truck, Lutzinger began to administer the balancing test.
5 Lewandowski Dep. 49:15–25. Greer continually asked questions such as “What’s going on? Why
6 are you bothering me?” and “Why messing with me?” Lutzinger Dep. 68:9–13; Tougas Dep. 42:
7 21–25; *see, e.g.*, Ex. 7 at 4:14, 22, 27–28. Perceiving that Greer was in an “agitated state,”
8 Lewandowski withdrew his Taser. Lewandowski Dep. 49:21–50:1. Tougas testified that at some
9 point Greer “pulled up his shorts and started to look around,” and determined that “those [were]
10 preassaultive behaviors.” Tougas Dep. 53:3–6. Plaintiff contends that his father was merely
11 identifying a shin injury for the officers. Opp’n at 5 (citing Combined Video and Lewandowski
12 Dep. 42:6–22). Greer also informed the officers that he had medical problems with his abdomen
13 region. *Id.* at 6 (citing Combined Video).

14 During the balance test, Greer was unable to follow basic commands and his agitation
15 increased. Lutzinger Dep. 71:23–73:8, 75:23–76:19. He eventually stopped the test and “started
16 to walk away.” *Id.* at 77:2–3; Tougas Dep. 50:20–53:6. Plaintiff contends that his father “simply
17 took several steps to his side,” Compl. ¶ 12, because an officer began to walk towards him. Opp’n
18 at 5. The officers told Greer to stop and put his hands behind his back. Tougas Dep. 58:2–3.
19 Lutzinger grabbed his right arm and attempted to use a “twist lock control hold” for compliance.
20 *Id.* at 80:11–18. As the officers struggled to control Greer’s hands, Lewandowski holstered his
21 Taser because “[h]e wasn’t active – he wasn’t fighting or throwing any punches,” Lewandowski
22 Dep. 67:24–25, and he “went in to assist the officers in trying to control [Greer’s] hands.” *Id.* at
23 68:3–7. Lutzinger did not intend to take Greer to the ground. Lutzinger Dep. 82:18–25. The
24 other officers grabbed ahold of Greer as they continued to move towards the rear of the truck. *Id.*
25 at 80:20–81:8.

26 **C. The Struggle**

27 Tougas grabbed the back of Greer’s t-shirt and “[t]he struggle was on.” Tougas Dep.
28 56:23–25. Tougas tried to use a takedown procedure because he wanted Greer on the ground. *Id.*

1 at 57:14–61:8, 16. Eventually, they all ended up on the ground, *id.* at 66:21, although none of the
2 officers reported using a takedown maneuver. Lutzinger Dep. 83:14–22; Lewandowski Dep.
3 68:20–21, 69:18–23, 71:7–9; Tougas Dep. 57:14–58:3, 60:11–61:16, 63:16–21. Greer initially fell
4 on his back or right side, but the officers were eventually able to roll him onto his stomach.
5 Lutzinger Dep. 85:18–86:2; Tougas Dep. 68:9–16; Lewandowski Dep. 73:19–25. Greer was “a
6 significantly obese man, with a protruding hernia that [was] clearly visible... .” Opp’n at 6.

7 Greer refused to allow the officers to handcuff him. The officers repeatedly told Greer to
8 calm down, stop resisting and put his hands behind his back, as they struggled to gain control of
9 Greer’s hands which were underneath his body. Lutzinger Dep. 85:18–20; Tougas Dep. 58:23–
10 59:4. Over the next seven minutes, approximately four or five officers attempted to control Greer
11 by various means, including tasing him, applying pressure with their hands and a baton, and
12 stepping on his head. Opp’n at 6 (citing Combined Video). The officers claim that Greer
13 exhibited “super human strength.” Lutzinger Dep. 89:12; Tougas Dep. 72:22–73:1; Lewandowski
14 Dep. 78:15–19; Tong Dep. 61:13–14. At some point during the struggle Tougas struck his head on
15 the back of Greer’s truck. Tougas Dep. 73:18–74:8. Somehow Tougas was able to pull Greer’s
16 right arm from underneath him. *Id.* at 73:16–17.

17 After several minutes, Lutzinger warned Greer that he would be tased if he did not stop
18 resisting. Lutzinger Dep. 89:22–90:3. He then twice discharged his Taser in dart mode, to no
19 effect. *Id.* During the struggle, HPD Officer McAdams and Reserve Officer Covarrubias arrived
20 on-scene and attempted to control Greer’s legs. Ex. D, McAdams Dep. 22:2–8, 25:8–19, 37:17–
21 22. At some point, Lewandowski placed his knee on Greer’s back near his left shoulder blade to
22 try to prevent him from getting up or rolling over. Lewandowski Dep. 75:8–76:10. Greer was
23 able to continue lifting up with Lewandowski’s knee on him. *Id.* at 78:15–23. While in this
24 position, Lewandowski discharged his Taser in drive mode. *Id.* at 100:19–101:14. This did not
25 have any effect either. *Id.* He also used his baton to try to pry Greer’s arm from under his torso.
26 *Id.* at 83:5–8. HPD officer Tong also applied two different types of nerve stimulation pain
27 techniques to Greer’s jawline. Rooney Decl. Ex. E, Tong Dep. 12:6–8, 38: 14–39:7, 40:5–41:1.
28 One of the techniques involved using a collapsible baton in the closed position. *Id.* at 43:4–44:11,

1 46:15–47:1.

2 Lutzinger was eventually able to secure a handcuff onto Greer’s left wrist. Lutzinger Dep.
3 89:5–6. Another officer secured a handcuff around Greer’s right wrist, and after a struggle lasting
4 approximately five to seven minutes; the officers were eventually able to link the handcuffs
5 together. Tougas was involved in the struggle, but it is unclear whether he assisted in handcuffing
6 Greer. Lutzinger Dep. 119:12 – 21; Tougas Dep. 75:16–25. The video shows the struggle from
7 Tougas’s perspective. According to plaintiff, “Tougas continuously applied pressure to Greer’s
8 torso from 7:55-10:36 on the Combined Video.” Opp’n at 6. During this time, “Greer repeatedly
9 begs the officers to ‘Get off [him].’” *Id.* at 7. His “breathing becomes rapid as he is struggling to
10 get air into his lungs.” *Id.* Plaintiff contends that Greer “appears to lose consciousness” around
11 the 10:30 mark, and “[y]et officers continue to hold him down in a prone position – continue
12 putting pressure on him – for another minute.” *Id.* (citing Combined Video).

13 After Greer was handcuffed, several HPD officers placed Greer into a WRAP, a three-part
14 device designed to control combative and resistive subjects. Mot. at 8; Lutzinger Depo. 98:4–
15 102:8; Ex. F, Cosgriff Depo. 22:17–23:24; Ex. G, Krimm Depo. 78. The device consists of an
16 ankle strap, a leg restraint, and a chest harness, with a tether connecting the chest harness to the
17 leg restraint. *Id.*

18 Plaintiff does not dispute that Tougas did not use a baton or Taser, or punch or kick Greer
19 during the struggle. Lutzinger Dep. 118:20–119:11, 120:3–121; Lewandowski Dep. 108:9–109:6;
20 Tong Dep. 80:16–81:7; Zwickey Decl. 19; Tougas Decl. ¶¶ 5–7 (Dkt. No. 59-3).

21 **D. Medical Response**

22 When the officers rolled Greer over, his eyes were closed. Tougas Dep. 84:7; Lutzinger
23 Dep. 113:2–3. Tougas stated aloud, “He’s unconscious.” *Id.* at 84:8. One of the officers checked
24 for a pulse, but it is unclear whether he found one. Lewandowski Dep. 96:18–97:5; Tougas Dep.
25 87:3–22. Plaintiff contends that Greer’s lips were blue when he was rolled over, as evidenced in
26 the Combined Video. Opp’n at 8 (citing Combined Video, Reuter Expert Report, MacAdams
27 Dep. 43:15–21). It is unclear if Greer was unconscious when the officers first began applying the
28 WRAP device. Tougas Dep. 84:7–24. According to Lewandowski, “[h]is head was lulled to the

1 side.” Lewandowski Dep. 96:10. The Hayward Fire Department and paramedics (“emergency
2 medical services” or “EMS”) were already on scene, but staging a safe distance away until the
3 scene was cleared. Lutzinger Dep. 113:6–8; Tougas Dep. 91:25; Lewandowski Dep. 97:5; Ex. J,
4 Brassfield Dep. 15:13–16:4. Approximately a minute or two passed between the time EMS staged
5 and the time the paramedics were dispatched to render aid. Brassfield Dep. 17:25–18:3.
6 According to the paramedic’s patient care report, Greer suffered cardiac arrest after EMS arrival.
7 *Id.* at 40:3–13. Within 30 – 60 seconds of EMS’s arrival, the WRAP was removed. Cajina Decl.
8 Ex. 14, Brassfield Dep. 26:21–27:4. The paramedics began administering CPR at approximately
9 11:04 p.m. Brassfield Dep. 48:6–16. They transported Greer from the scene at 11:16 p.m. and
10 arrived at the hospital at 11:27 p.m. Greer was pronounced dead at 11:49 p.m.

11 **E. Third Party Witnesses**

12 On the night of the incident, Pastor Todd Hendricks was on a ride-along with Officer
13 Clark. Ex. H, Hendricks Dep. 9:3–11. He observed the encounter from approximately 30 yards
14 and witnessed Greer resisting the officers’ attempts to control him. *Id.* at 31:13–32:2, 37:19–25,
15 36:19–37:18, 26:9–13, 53:1–8, 32:3–4. He did not see the officers punch, kick, or use a baton on
16 Greer. *Id.* at 37:4–7. A second eyewitness, Cuitahus Frias, also observed Greer resisting and
17 denied seeing the officers kicking, punching, or standing on Greer. Ex. I, Frias Dep. 29:24–30:11,
18 31:21–32:3.

19 **F. BART Training and Policies**

20 BART Police Department requires a minimum of 40 hours of training every year,
21 compared to the 24 hours every two years required by the Peace Officers Standard and Training
22 (POST). Mot. at 9; *see also* Haight Decl. ¶ 9 (Dkt. No. 59-5).

23 **G. Forensic Investigations**

24 The Alameda County medical examiner considered his autopsy dissection, the Toxicology
25 Report, and the coroner’s investigation report and determined Greer’s cause of death to be acute
26 phencyclidine (PCP) intoxication associated with physical exertion. Ex. K, Rogers Depo. 41:16–
27 43:20. The manner of death is listed as “accident.” Greer’s PCP level was 0.596 milligrams per
28 liter (mgL). Ex. L, Posey Depo. 26:12–14. The fatal range for PCP is 0.3 to 25 mgL. *Id.* at

30:16-21. He was 46 years old, 5'11" tall and weighed 380 pounds.

H. Plaintiff's Experts⁵

In opposition to summary judgment, plaintiff submitted numerous expert reports. The experts include Bryan Reuter, a digital forensic examiner who synchronized and analyzed the video footage, and created still images from the video, Cajina Decl. Exs. 7 and 8 (Dkt. Nos. 61-9 and 61-10; Barry Brodd, “Use of Force” police expert, Cajina Decl. Ex. 9 (Dkt. No. 61-11), Dr. Carter Clements, emergency medical expert, Cajina Decl. Ex. 10 (Dkt. No. 61-12), Dr. Kent Olson, medical toxicology expert, Cajina Decl. Ex. 11 (Dkt. No. 61-12), and Dr. Joseph Cohen, forensic pathologist, Cajina Decl. Ex. 12 (Dkt. No. 61-14).

1. Reuter Report

Reuter concludes, “the body mounted video recording depicts Sergeant Tougas pulling Mr. Greer to the ground, maintaining contact with Mr. Greer as a taser was being deployed, and continuously leaning on Mr. Greer from above while applying the pressure of his bodyweight onto Mr. Greer’s torso from 00:07:53 until 00:11:21, a total of approximately 3 minutes, 28 seconds. After Mr. Greer was rolled onto his back, Sergeant Tougas declared him unconscious. Sergeant Tougas then walked away from Mr. Greer.” Cajina Decl. Ex. 8 (Dkt. No. 61-10).

2. Brodd Report

Brodd reviewed police reports, the videos, depositions and other discovery, the policies and procedures of the police departments, the personnel records for the officers, the WRAP training manual, the POST use of force, and the relevant law. Brodd Report at 2. He concluded, in part:

- d. Failure of Lt. Lutzinger and the officers engaged with Mr. Greer to realize that due to the amount of pressure applied to Mr. Greer's upper torso and Mr. Greer's physical statute it would have been extremely difficult for Mr. Greer to have placed his hands behind his back;
- e. Attempting to control Mr. Greer by intentionally and forcefully stepping on Mr. Greer's head while Mr. Greer was in a prone position on the pavement and being held down by a minimum of five officers;

⁵ Defendants agreed that expert reports would be admissible in connection with the motion for summary judgment. Rooney Decl. ¶ 14.

1 ...

2 g. Applying prolonged and extreme pressure to Mr. Greer's torso
3 while he lay in a prone position, which is a known and taught
4 danger given that it can cause positional asphyxia – especially
5 given Mr. Greer's body size, weight, level of exertion and
6 apparent problems with his abdomen;
7 h. Failing to recognize and properly react to signs of Mr. Greer's
8 labored breathing as he lay prone on the ground;

9 Brodd Report at 3–4.

10 **3. Clements Report**

11 Dr. Clements reviewed the videos, paramedic reports, fire department records, police
12 reports, hospital records, autopsy report, deposition testimony, and American Heart Association
13 Guidelines for CPR prior to forming his opinion. Clements Report at 2–3. Dr. Clements
14 concluded, in part: Mr. Greer's conduct was inconsistent with the level of PCP found in his
15 system; the cause of Mr. Greer's death was asphyxia; a major factor in his death was the amount
16 of time he spent in the prone position with officers compressing his chest cavity and abdomen
17 cavity; he was unconscious when he was rolled over; and, had he been given immediate medical
18 attention he would have survived. *Id.* at 3–4. He further opines that the “efforts by Mr. Greer to
19 move from the prone position he was being held in ... were at least in part due to his effort to
20 breath because, in that position, Mr. Greer was unable to get air in and out of his lungs.” *Id.* at 4.

21 **4. Olson Report**

22 Dr. Olson reviewed the same records as Dr. Clements, plus medical literature related to
23 phencyclidine intoxication. Clements Report (Dkt. No. 61-13 at 4). He concluded that “[Greer]
24 exhibited no signs of serious or life-threatening phencyclidine (PCP) intoxication during his initial
25 interaction with police,” and he “did not die as a direct result of phencyclidine intoxication, but as
26 a consequence of his physical interaction with the police.” *Id.* He states that “[d]eath from
27 phencyclidine alone is very uncommon” and would be associated with other symptoms not
28 observed in Mr. Greer. *Id.* He explains that the acidity of Mr. Greer's blood would have been
 elevated by increased carbon dioxide caused by his inability to breath. *Id.* at 4–5. He cites to
 medical literature to posit that the measured level of PCP is inconclusive because “[w]hen the
 blood is more acidic, PCP shifts from tissues into the blood.” *Id.* at 5.

5. Cohen Report

1 Dr. Cohen reviewed all of the police reports, hospital records, photographs, Coroner's
2 report, autopsy protocol, histological examination, toxicology report, video and audio files,
3 deposition testimony, discovery documents, and the certificate of death. Cohen Report at 1 (Dkt.
4 No. 61-14). He criticized the autopsy report, noting “”[m]arked suffusion of the head, neck and
5 upper torso is readily apparent in photographs of Mr. Greer, though this is not mentioned in the
6 autopsy report.” *Id.* at 4. According to Dr. Cohen, “[t]his is indicative of antemortem
7 compression of the torso with the development of relative hypoxia.” *Id.* He states that
8 “[p]henacyclidine intoxication provided a physiologic contribution to his death, in the face of the
9 physical confrontation, through death would not have occurred at that particular time in the
10 absence of a confrontation.” *Id.* He concluded that the cause of death was “Cardiorespiratory
11 arrest (minutes) due to Sustained Hypoxia (minutes) due to Prolonged Physical Confrontation and
12 Restraint by Law Enforcement (minutes).” *Id.* And “[o]ther significant contributing factors” as
13 “Hypertensive Cardiovascular Disease; Obesity; Phencyclidine Intoxication.” *Id.* And finally,
14 “[t]he manner of death is most appropriately classified as ‘homicide (death in the hands of
15 other(s)).’” *Id.*

II. PROCEDURAL BACKGROUND

17 On March 23, 2015, plaintiff, heir of the decedent, commenced this action in the Superior
18 Court of the State of California, Alameda County. Compl. ¶ 1. Defendant City of Hayward was
19 served on April 22, 2015, and, with consent from defendant BART, removed the action to federal
20 court on May 22, 2015. Notice of Removal (Dkt. No. 1). Plaintiff filed a first amended complaint
21 on March 9, 2016 (Dkt. No. 35), and a second amended complaint (“SAC”) on April 7, 2016 (Dkt.
22 No. 38). Plaintiff brought causes of action against the City of Hayward, BART, and the individual
23 officers for: (1) wrongful death, SAC ¶¶ 20–25; (2) a violation of his father's Fourth Amendment
24 rights, *id.* at ¶¶ 26–31; and (3) a violation of his father's Fourteenth Amendment rights, *id.* at 32–
25 37.

LEGAL STANDARD

27 Summary judgment on a claim or defense is appropriate “if the movant shows that there is
28

1 no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
2 law.” Fed. R. Civ. P. 56(a). In order to prevail, a party moving for summary judgment must show
3 the absence of a genuine issue of material fact with respect to an essential element of the non-
4 moving party’s claim, or to a defense on which the non-moving party will bear the burden of
5 persuasion at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has
6 made this showing, the burden then shifts to the party opposing summary judgment to identify
7 “specific facts showing there is a genuine issue for trial.” *Id.* The party opposing summary
8 judgment must then present affirmative evidence from which a jury could return a verdict in that
9 party’s favor. *Anderson v. Liberty Lobby*, 477 U.S. 242, 257 (1986).

10 On summary judgment, the Court draws all reasonable factual inferences in favor of the
11 non-movant. *Id.* at 255. In deciding a motion for summary judgment, “[c]redibility
12 determinations, the weighing of the evidence, and the drawing of legitimate inferences from the
13 facts are jury functions, not those of a judge.” *Id.* However, conclusory and speculative testimony
14 does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See Thornhill
15 Publ’g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

16 DISCUSSION

17 BART and Sergeant Tougas move for summary judgment on the grounds that there is no
18 genuine issue of material fact as to the following issues: (1) Tougas’s use of force was reasonable;
19 (2) Tougas is entitled to qualified immunity; (3) there was no loss of familial relationship; (4)
20 Tougas was not deliberately indifferent to Greer’s medical condition; (5) Tougas was not an
21 integral participant; (6) there is no proximate cause between Greer’s death and Tougas’s actions;
22 (7) BART is immune under Government Code § 845.6; (8) there is no viable Monnell claim
23 against BART; and (9) Tougas had no reasonable opportunity to intercede. BART’s Mot. for
24 Summ. J. (Dkt. No. 59). Plaintiff relies heavily on Tougas’s body camera footage to argue that
25 Tougas took Greer to the ground, applied his body weight to Greer’s back for several minutes,
26 recognized that Greer was unconscious when the officers rolled him over, and failed to render
27 medical aid. Opp’n at 1–2 (Dkt. No. 62).

I. PRELIMINARY ISSUES**A. Proximate Cause**

Plaintiff warns that the Alameda County Medical Examiner's conclusion regarding Greer's cause of death "should be taken with a large grain of salt" because Dr. Rogers never watched the police body camera video and he misstated critical facts at his deposition. Opp'n at 8. According to plaintiff's pathology expert, Greer's death resulted from the "minutes of sustained relative hypoxia consequent to restraint maneuvers and compression [of Greer's] torso with inability to adequately exchange air." Cohen Report at 4 (Dkt. No. 61-14). Plaintiff also points to the nearly seven minutes that passed between when Greer was turned over and when the paramedics began administering CPR. Opp'n at 9 (citing Clements Report and Cohen Report). Additionally, plaintiff provides an expert toxicologist who reports that "it is likely that the measured postmortem blood level of 0.596 mg/L was artificially high (perhaps as much as 10-fold) compared to what it was when he was initially stopped by police, due to the effects of acute respiratory and metabolic acidosis on the measured blood level." Olson Report (Dkt. No. 61-13). Given plaintiff's evidence, a disputed issue exists as to the actual cause of Greer's death.

B. Integral Participant

BART argues that Tougas was not an integral participant in an alleged constitutional violation because there was no coordination between Tougas and the HPD officers, and therefore, Tougas "was not fundamentally involved in restraining Mr. Greer." Mot. at 18–19. Plaintiff counters that Tougas "directly violate[d] Mr. Greer's rights by, among other things, compressing his torso to the point he could no longer breath, despite Greer's repeated cries, and by failing to render any medical aid to a person he knew, or should've known, was in acute medical distress." Opp'n at 14.

"An officer's liability under section 1983 is predicated on his 'integral participation' in the alleged violation." *Brown v. City & Cty. of San Francisco*, No. C 11-02162 LB, 2014 WL 1364931, at *10 (N.D. Cal. Apr. 7, 2014)(quoting *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007)). "Integral participation does not require each officer's actions themselves rise to the level of a constitutional violation. But it does require some fundamental involvement in

1 the conduct that allegedly caused the violation.” *Id.* (internal quotation marks and citations
2 omitted).

3 BART misunderstands the requirements of an integral participant. In *Blankenhorn*, the
4 court concluded that the officers who tackled the plaintiff were integral participants. 485 F.3d at
5 481 n.12. Here, Tougas may have been responsible for bringing Greer to the ground. Opp’n at 6
6 (citing Combined Video); *see also* Cajina Decl. Ex. 8 (Reuter Supplemental Report) at 3. Further,
7 he assisted the other officers in attempting to handcuff Greer by applying pressure to his body.
8 *See id.* Unlike the officer in *Brown*, Tougas was involved in the duration of the struggle. 2014
9 WL 1364931, at *11. There is at least a dispute of material fact whether Tougas was an integral
10 participant.

11 **II. SECTION 1983 CLAIMS**

12 A cause of action for violation of the Constitution by a person acting under color of state
13 law is brought under 42 U.S.C. § 1983. *Gomez v. Toledo*, 446 U.S. 635, 639 (1980). To
14 successfully assert a section 1983 claim, plaintiff must demonstrate that the action (1) occurred
15 “under color of state law,” and (2) resulted in the deprivation of a constitutional or federal
16 statutory right. *Leer v. Murphy*, 844 F.2d 628, 632–33 (9th Cir. 1988) (citations omitted). The
17 parties do not dispute that the defendants acted under color of state law, but argue whether Tougas
18 used excessive force or is otherwise entitled to qualified immunity.

19 **A. Fourth Amendment – Excessive Force**

20 Under the Fourth Amendment, the amount of force used by law enforcement officers must
21 be objectively reasonable when viewed in light of the totality of the circumstances. *Tennessee v.*
22 *Garner*, 471 U.S. 1, 7–8 (1985). Determining the objective reasonableness of a particular use of
23 force involves a three-step inquiry. *Graham v. Connor*, 490 U.S. 386, 396 (1989). After first
24 assessing the type and amount of force inflicted, the court should determine the government’s
25 interests at stake by looking to “(1) the severity of the crime at issue, (2) whether the suspect
26 posed an immediate threat to the safety of the officers or others, and (3) whether the suspect
27 actively resisted arrest or attempted to escape.” *Maxwell v. Cty. of San Diego*, 697 F.3d 941, 951
28 (9th Cir. 2012). These factors are non-exhaustive. *Id.*

1 The final step is to balance the degree of force used against the government interest at
2 stake to determine if the force used was “greater than is reasonable under the circumstance.”
3 *Santos v. Gates*, 287 F.3d 846, 854 (9th Cir. 2002). “The reasonableness of a particular use of
4 force must be judged from the perspective of a reasonable officer on the scene, rather than with the
5 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396. And this determination is “ordinarily a
6 question of fact for the jury.” *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997).
7 Accordingly, “summary judgment should be granted sparingly.” *Maxwell*, 697 F.3d at 951.

8 BART argues that Tougas’s use of force was reasonable under the totality of the
9 circumstances because he was confronted by “an extremely large and combative individual ...
10 with ‘Hulk-like strength.’” Mot. at 11. Greer claims that the officers “were negligent and careless
11 in their actions ... by[] deliberately and intentionally Tasering decedent at least three times in rapid
12 succession; placing decedent in a WRAP and applying pressure to decedent’s back even though he
13 was unconscious, resulting in asphyxia... .” SAC at 5:26–6:3. He argues that Tougas is the one
14 officer that decided to escalate the situation and deliberately brought Greer down to the ground.
15 Opp’n at 13–14. He points to the video footage and Tougas’s own deposition testimony to
16 highlight Tougas’s “inappropriate state of mind.” *Id.* at 5.

17 **1. *Graham* Analysis**

18 a. Nature and Quality of Intrusion

19 The incident involved the actions of numerous officers, all of whom participated in some
20 way to the use of force against Greer. It is undisputed that Tougas did not use his Taser, nor did
21 he kick, punch, or deploy his baton in an effort to control Greer. But plaintiff claims—and the
22 video tends to corroborate his claims—that Tougas continuously applied pressure to Greer’s torso
23 in an attempt to control him. Because the present motion pertains only to Tougas, the analysis will
24 focus on his application of prolonged body-weight on Greer’s torso while Greer was in a prone
25 position. While it is true that “not every push or shove, even if it may seem unnecessary in the
26 peace of a judge’s chambers is a violation of the Fourth Amendment, it is equally true that even
27 where some force is justified, the amount actually used may be excessive.” *Santos v. Gates*, 287
28 F.3d 846, 853 (9th Cir. 2002)(internal quotation marks and citation omitted).

1 The video depicts Greer on the ground in a prone position for approximately seven minutes
2 while several officers, including Tougas, applied pressure to various parts of Greer's body in an
3 attempt to make him comply. According to plaintiff, Tougas "continuously applied pressure to
4 Greer's torso from 7:55–10:36:01." Opp'n at 6 (citing Combined Video); *see also* Reuter
5 Supplemental Report at 3. BART highlights that Greer never claimed he was unable to breathe.
6 Reply at 8. But as plaintiff points out, Greer "repeatedly beg[ged] the officers to 'Get off [him]'."
7 *Id.* at 6–7. He then yelled in desperation as his breathing became labored, and he eventually
8 "stop[ped] saying words, and start[ed] grunting." *Id.* This evidence at least creates a genuine
9 issue whether the officers knew that Greer was having trouble breathing.

10 Although no evidence regarding the officers' knowledge of the risks of compression
11 asphyxia was presented, the officers may have been on notice that Greer had issues with his
12 abdomen that would have been exacerbated by his position on the ground. Opp'n at 6 (citing
13 Combined Video).⁶ As discussed above, there exists a genuine issue as to the cause of Greer's
14 death. Even though the officers may not have intended to use deadly force, their actions may have
15 resulted in Greer's death and could be found substantially likely to cause serious harm or death.
16 *Bryan v. MacPherson*, 630 F.3d 805, 825 (9th Cir. 2010)(finding lethal force is that which
17 "creates a substantial risk of death or serious bodily injury."). Viewing the evidence in the light
18 most favorable to Greer, "a reasonable jury could find that the officers' use of force was
19 excessive." *Lolli v. Cty. of Orange*, 351 F.3d 410, 416 (9th Cir. 2003).

20 A recent case from the Eastern District of California (which the parties inexplicably failed
21 to cite) analyzed a similar factual scenario in which the detainee, who was clearly under the
22 influence, "was restrained and prone on the ground for approximately eight to ten minutes with
23 four officers applying body-weight pressure to his back." *Garlick v. Cty. of Kern*, 167 F. Supp. 3d
24 1117, 1155 (2016). The court noted that "[p]revailing precedent in the Ninth Circuit is that law
25 enforcement officers' use of body weight to restrain a 'prone and handcuffed individual [] in an

26
27

⁶ It is unclear from the bodycam footage and transcript whether Greer actually indicated a problem
28 with his abdomen, but at one point he appears to gesture towards his abdomen region. *See*
Combined Video at 0:03:00.70.

1 agitated state’ can cause suffocation ‘under the weight of restraining officers,’ therefore, such
2 conduct may be considered deadly force.” *Id.* (citing *Drummond ex rel. Drummond v. City of*
3 *Anaheim*, 343 F.3d 1052, 1056–67 (9th Cir. 2003)). “Known as ‘compression asphyxia,’ prone
4 and handcuffed individuals in an agitated state have suffocated under the weight of restraining
5 officers.” *Id.* (citation omitted).

6 In *Drummond*, two officers brought to the ground an unarmed man whom they knew
7 suffered from mental illness. *Id.* at 1054. Although Drummond “offered no resistance,” the
8 officers continuously applied their weight to his neck and upper torso. *Id.* Drummond repeatedly
9 told the officers he could not breathe; he soon fell into respiratory distress, and eventually lost
10 consciousness. *Id.* at 1054–55. In analyzing the *Graham* factors, the court found that the officers
11 applied severe force that resulted in compression asphyxia, *id.* at 1056, despite the minimal need
12 for force because Drummond was not resisting and “*no* underlying crime was at issue.” *Id.* at
13 1057 (emphasis in original)(internal quotation marks omitted).

14 While there are factual differences between *Garlick* and this case, on the one hand, and
15 *Drummond* on the other, the *Garlick* court found that “*Drummond*[] makes plain that multiple
16 officers’ use of prolonged body-weight pressure to a suspect’s back is known to be capable of
17 causing serious injury or death.” *Garlick*, 167 F. Supp. 3d at 1155 (citing *Drummond*, 343 F.3d at
18 1056). I agree with its analysis. Under *Drummond*, and viewing the facts in a light most
19 favorable to plaintiff, the nature and quality of the force used here could constitute lethal force.
20 *Id.*; *see also* *Bryan*, 630 F.3d at 825 (finding lethal force is that which “creates a substantial risk of
21 death or serious bodily injury.”)

b. Government Interest

i. Severity of crime

24 Greer was suspected only of a non-violent crime, driving under the influence. Viewing the
25 evidence in the light most favorable to Greer suggests that he was pulled over for minor traffic
26 violations and that Lutzinger was unable to conclusively determine whether he was driving under
27 the influence. There is no evidence that Greer escalated the incident to a violent encounter.

ii. Immediate threat to officers

1 “The most important factor under *Graham* is whether the suspect posed an immediate
2 threat to the safety of the officers or others.” *Bryan*, 630 F.3d at 826 . In finding this factor
3 weighed against the reasonableness of the police officers’ conduct in *Drummond*, the court noted
4 the detainee’s relatively slight weight at 160 pounds compared to one of the officer’s 225 pounds.
5 343 F.3d at 1057. Here, Greer weighed 380 pounds and a number of the officers testified as to his
6 size and strength. But the officers also testified that Greer was not combative, merely
7 uncooperative. None of them explicitly testified that they feared for their own safety. And the
8 video raises doubts as to whether the officers were confronted with an “imminent threat of
9 violence.” *Ryburn v. Huff*, 132 S. Ct. 987, 990 (2012).

10 Of course, “judges should be cautious about second-guessing a police officer’s assessment,
11 made on the scene, of the danger presented by a particular situation.” *Id.* at 991–92. But none of
12 the officers testified that Greer presented a threat to their safety—he was not armed and did not
13 verbally threaten the officers. *Cf. George v. Morris*, 736 F.3d 829, 838 (9th Cir. 2013)(“If the
14 person is armed—or reasonably suspected of being armed—a furtive movement, harrowing
15 gesture, or serious verbal threat might create an immediate threat.”); *Gregory v. Cty. of Maui*, 523
16 F.3d 1103, 1108–09 (9th Cir. 2008)(“Moreover, the officers had reason to believe that Gregory
17 posed a threat to them, because he refused their requests, acted in an aggressive manner, and had
18 already assaulted Finazzo.”) The *Garlick* court found that “[d]efendants’ allegations about the
19 officers’ concerns about [detainee’s] size, apparent intoxication (alcohol or illicit substances), and
20 general actions or noncompliance, are insufficient factual bases for the Court to conclude that
21 [detainee] was an actual immediate threat, post-handcuffing, where a reasonable jury could also
22 conclude that such conduct poses no such threat.” *Garlick*, 167 F. Supp. 3d at 1156. The same
23 holds true here. Defendants have not presented sufficient evidence establishing the immediacy of
24 the threat to the safety of the officers or others.

25 iii. Resisting Arrest

26 The parties dispute whether Greer resisted arrest. While the officers insist Greer’s
27 resistance caused the struggle, plaintiff’s expert contends that Greer could merely have been
28 struggling for air while he was face down in a prone position with five officers on top of him. *See*

1 Clements Report at 4. The defendants point to the officers' testimony, corroborated by third-party
2 witnesses, and to the officers repeated commands for Greer to relax and put his hands behind his
3 back.

4 Once again, the similarities to *Garlick* are instructive. *Garlick*, 167 F. Supp. 3d at 1156–
5 57 (“Plaintiffs further allege that the officers’ weight on Silva’s back restricted his breathing and
6 that Silva’s movements trying to lift his chest and kicking his legs were not resistance but a sign of
7 his struggle to breathe.”) In finding a genuine issue of material fact whether the detainee was
8 actively or passively resisting, the court noted that “[s]imilar cases turn on the fact-finder’s
9 determination of where on the spectrum of resistance a misdemeanor suspect falls.” *Id.* at 1157
10 (collecting cases); *see also Tucker v. Las Vegas Metro. Police Dep’t*, 470 F. App’x 627, 629 (9th
11 Cir. 2012)(“Keith, unlike Drummond, continued to resist the officers after handcuffs were applied,
12 but this distinction does not, by itself, suffice to bring this case out of Drummond’s orbit.”) I agree
13 with the reasoning in *Garlick*; this issue should be left to the jury.

14 c. Balancing Level of Intrusion Against Government Interests

15 To support its argument that Tougas’s actions were reasonable under the circumstances,
16 BART submitted a declaration from Jared Zwickey, an Associate Professor at the San Joaquin
17 Delta College District in the Administration of Justice Discipline with over 38 years of law
18 enforcement experience. Zwickey Decl. ¶ 1, 8 (Dkt. No. 59-4). He works closely with the
19 California Commission on Basic Police Officer Standards and Training (POST), and currently
20 serves as the use of force subject matter expert. *Id.* ¶ 4. After reviewing numerous materials,
21 including police reports, the BART police video, the autopsy and coroner’s reports, and the
22 deposition testimonies, he concluded that Tougas used reasonable force in detaining Greer. *Id.* ¶
23 13. Plaintiff countered with the report of Barry Brodd, a retired officer and adjunct faculty
24 member with 29 years of law enforcement experience and 34 years of teaching experience, who
25 concluded that HPD and BART PD “violated their training and standards of practice for police
26 officers in California in their detention of James Greer. . . .” Cajina Decl. Ex. 9, Initial Report of
27 Barry Brodd at 3 (Dkt. No. 61-11).

28 Although there was an actual crime at issue, since Lutzinger observed Greer commit traffic

1 violations and suspected him of driving under the influence, the severity of the crime was
2 relatively minor and there is no evidence that the officers feared for their safety. Further, the
3 purported “resistance” may have been passive, and not active. These factors suggest that the
4 government interest was low. The requisite balancing to determine whether the officers’ use of
5 force was reasonable, when considering their attempts to secure a 380 pound man who was
6 passively or actively resisting arrest, “requires a jury to sift through disputed factual contentions,
7 and to draw inferences therefrom. . . .” *Id.* When balanced against the lethal level of force
8 employed, a factfinder could find the level of force used objectively unreasonable under the
9 circumstances. Tougas’s actions, in conjunction with the conduct of the other officers, may rise to
10 the level of an constitutional violation.

11 **B. Tougas is Not Entitled to Qualified Immunity**

12 BART and Tougas argue that Tougas is entitled to the protection of qualified immunity
13 because his actions were objectively reasonable under the circumstances. Mot. at 13. “The
14 doctrine of qualified immunity protects government officials from liability for civil damages
15 insofar as their conduct does not violate clearly established statutory or constitutional rights of
16 which a reasonable person would have known.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)
17 (internal quotation marks and citation omitted). “A clearly established right is one that is
18 sufficiently clear that every reasonable official would have understood that what he is doing
19 violates that right.” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)(internal quotation marks
20 omitted). The Supreme Court has repeatedly—and recently—“reiterate[d] the longstanding
21 principle that ‘clearly established law’ should not be defined ‘at a high level of generality.’”
22 *White v. Pauly*, 580 U.S. ___, No. 16-67, slip op. at 6 (Jan. 9, 2017) (quoting *Ashcroft v. al-Kidd*,
23 563 U.S. 731, 742 (2011)). Rather, “clearly established law must be particularized to the facts of
24 the case.” *Id.* (internal quotation marks and citation omitted).

25 “Put simply, qualified immunity protects all but the plainly incompetent or those who
26 knowingly violate the law.” *Id.* (internal quotation marks omitted). In addition, the Supreme
27 Court has “repeatedly [] stressed the importance of resolving immunity questions at the earliest
28 possible stage in litigation.” *Pearson*, 555 U.S. at 232. However, “[i]f a genuine issue of material

1 fact exists that prevents a determination of qualified immunity at summary judgment, the case
2 must proceed to trial.” *Serrano v. Francis*, 345 F.3d 1071, 1077 (9th Cir. 2003). Defendants bear
3 the burden to prove they are entitled to qualified immunity. *Moreno v. Baca*, 431 F.3d 633, 638
4 (9th Cir. 2005).

5 The appropriate inquiry is “whether it was clearly established that the Fourth Amendment
6 prohibited the officer’s conduct in the situation [he] confronted.” *Mullenix v. Luna*, 136 S. Ct.
7 305, 309 (2015). Greer cites to *Drummond* to support his position that “fact patterns such as the
8 one presented here – where officers use excessive force against a suspect in a prone position,
9 resulting in asphyxia … do not shield officers from liability under qualified immunity.” Opp’n at
10 11 (citing *Drummond*, 343 F.3d at 1061–62). The *Garlick* court agreed. 167 F. Supp. 3d at 1158
11 (“*Drummond* is sufficiently similar to the specific context of this case that it clearly warned
12 officers that when a suspect is handcuffed and prone on the ground, further restraint measures, if
13 applied as alleged here, would be unconstitutional.”). Several unpublished Ninth Circuit decisions
14 also support plaintiff’s position. *See, e.g., Tucker v. Las Vegas Metro. Police Dep’t*, 470 F. App’x
15 627, 629 (9th Cir. 2012)(“Turning to the clearly established law inquiry, we conclude that existing
16 law recognized a Fourth Amendment violation where two officers use their body pressure to
17 restrain a delirious, prone, and handcuffed individual who poses no serious safety threat.”);
18 *Abston v. City of Merced*, 506 F. App’x 650, 652-53 (9th Cir. 2013)(“ A reasonable fact-finder
19 could conclude that defendants’ use of body compression as a means of restraint was unreasonable
20 and unjustified by any threat of harm or escape when Abston was handcuffed and shackled, in a
21 prone position, and surrounded by numerous officers.”). Accordingly, *Drummond* created clearly
22 established law on a particularized level sufficient to give fair and clear warning to officers. *See*
23 *White, supra.*

24 BART and Tougas contend that officers are entitled to “breathing room regarding use of
25 force,” that they “need not retreat or desist,” and have a “right to self-defense.” Mot. at 14. That
26 may be, but clearly established law indicates that the officers’ use of prolonged pressure while
27 Greer lay on the ground in a prone position was substantially likely to cause death or serious
28 injury, and such force may not have been reasonable under the circumstances. A jury may agree

1 with Tougas's view of the evidence, but given the disputed facts and the clearly established law, I
2 cannot find that Tougas is entitled to qualified immunity as a matter of law.

3 **C. Fourth Amendment – Denial of Medical Care⁷**

4 Under the Fourth Amendment, officers must provide objectively reasonable post-arrest
5 medical care to a detainee. *Tatum v. City and Cty. of San Francisco*, 441 F.3d at 1090, 1099 (9th
6 Cir. 2006). “[A] police officer who promptly summons ... necessary medical assistance has acted
7 reasonably for purposes of the Fourth Amendment, even if the officer did not administer CPR.”
8 *Id.* Here, the evidence indicates that EMS arrived on the scene as the officers continued to
9 struggle with Greer. Plaintiff claims that Tougas and the other officers knew that Greer was
10 unconscious and yet walked away and neglected to administer CPR. Opp'n at 8–9. BART points
11 to testimony from the officers and third-party witness Pastor Todd Hendricks to support its
12 position that paramedics administered CPR without delay and therefore, Tougas was not
13 deliberately indifferent to Greer's medical needs. Mot. at 15–18; Reply at 10–11.

14 The parties disagree over the relevance of *Lolli v County of Orange, supra*, to this case.
15 See Mot. at 16–17; Opp'n at 12. Lolli was a diabetic who allegedly told the officers of his medical
16 condition and need for medical assistance. 351 F.3d at 419. Some officers, despite having actual
17 knowledge of Lolli's deteriorating medical condition, failed to provide medical aid. *Id.* at 420
18 The Ninth Circuit found that issues of fact precluded summary judgment. *Id.*

19 BART argues that this case is not like *Lolli* because “Tougas did not have such direct
20 actual knowledge.” Mot. at 17. Defendants further contend that the presence of paramedics “who
21 [were] more experienced in rendering medical care,” *id.* at 18, precludes a finding of deliberate
22 indifference. Plaintiff responds that the defendants’ “argument is belied by the Combined
23 Video[,]” where “for nearly two minutes – no paramedics or EMTs were near Greer.” Opp'n at 9.
24 Further, “the physical restraints impeded the paramedics’ ability to provide care,” and “nearly
25 seven minutes had gone by from the time Mr. Greer was first flipped over ... to when he received

26
27 ⁷ BART's immunity under Government Code 845.6 pertains to claims by *prisoners*. Greer was
28 not a prisoner, and BART offers no authority that this immunity extends to others in police
custody.

1 the first chest compressions... ." *Id.* (citing Brassfield Depo.).

2 This case is not like *Lolli*. The officers "promptly summoned medical care," and "acted
3 reasonably for purposes of the Fourth Amendment." *Acevedo v. City of Anaheim*, No. 8:14-CV-
4 01147-ODW(E), 2016 WL 79786, at *5 (C.D. Cal. Jan. 6, 2016). Even accepting plaintiff's
5 allegations as true, Tougas is entitled to summary judgment on Greer's failure to render medical
6 aid claim.

7 **D. Fourteenth Amendment – Substantive Due Process Claim**

8 Plaintiff brings a cause of action for loss of familial relationship.⁸ Compl. § 31–37. The
9 Fourteenth Amendment's substantive due process clause protects against "government power
10 arbitrarily and oppressively exercised." *Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998). "The
11 Supreme Court has made it clear ... that only official conduct that 'shocks the conscience' is
12 cognizable as a due process violation." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008)
13 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)). "The relevant question ... is
14 whether the shocks the conscience standard is met by showing ... *deliberate indifference* or
15 requires a more demanding showing [of] a *purpose to harm* [decedent] for reasons unrelated to
16 legitimate law enforcement objectives." *Id.* Plaintiffs urge me to apply the deliberate indifference
17 standard, while defendants contend the proper standard is a purpose to harm. Mot. at 14.

18 The *Porter* court reviewed precedent and found that the more deferential "purpose to
19 harm" standard should apply when officers are "reacting to the urgent public safety threat of
20 fleeing motorists in a situation where inaction could be the most dangerous." *Id.* The court
21 concluded that the higher standard should apply even where the officers faced a "much less
22 obvious public safety threat" than in police chase cases "because the critical consideration is
23 whether the circumstances are such that actual deliberation is practical." *Id.* (internal quotation
24 marks and citation omitted). Here, the confrontation between Greer and the officers was not
25 "rapidly escalating" in the same way as in *Porter*. But when Tougas pulled Greer's shirt, he was
26 making a "snap judgment" in which actual deliberation may have been impractical. *See Lewis*,

27
28 ⁸ Defendants' argument that no familial relationship exists between plaintiff and his father is,
charitably, unconvincing.

1 523 U.S. at 851.

2 Subsequent cases have characterized *Lewis*'s "purpose to harm" as "the standard of
3 culpability as applicable to substantive due process claims arising from the unintentional killing of
4 an individual by law enforcement officers." *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d
5 365, 372 (9th Cir. 1998). Accordingly, "intentionality is relevant" but not central. *Porter*, 546
6 F.3d at 1138. Here, the officers had time to deliberate while they lay on Greer's back as he
7 struggled to breathe. This is a close question, but again, the *Garlick* reasoning is helpful: "a
8 reasonable trier of fact could conclude from [defendants'] alleged conduct pressing body-weight
9 on Silva's back for a prolonged period that these officers were deliberately indifferent to the risk
10 posed by their conduct to Silva's unjustified deprivation of liberty." *Garlick*, 167 F. Supp. 3d at
11 1171. The court relied on *Drummond* to find that the officers' "inaction [of not removing the
12 pressure from Silva's back] supports the inference that the officers were deliberately indifferent to
13 the risk of serious injury or death posed by their conduct." *Id.* Here, there is evidence to support
14 both standards, and the determination should be left to the jury. *C.E.W. v. City of Hayward*, No.
15 13-cv-04516-LB, 2015 WL 1926289, at *13 (N.D. Cal. Apr. 27, 2015).

16 **III. CLAIMS AGAINST BART**

17 Local governments "can be sued directly under § 1983 for monetary, declaratory, or
18 injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a
19 policy statement, ordinance, regulation, or decision officially adopted and promulgated by that
20 body's officers." *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978). "There
21 are three ways to show a policy or custom of a municipality: (1) by showing a longstanding
22 practice or custom which constitutes the 'standard operating procedure' of the local government
23 entity; (2) by showing that the decision-making official was, as a matter of state law, a final
24 policymaking authority whose edicts or acts may fairly be said to represent official policy in the
25 area of decision; or (3) by showing that an official with final policymaking authority either
26 delegated that authority to, or ratified the decision of, a subordinate." *Menotti v. City of Seattle*,
27 409 F.3d 1113, 1147 (9th Cir. 2005)(internal quotation marks omitted). "Liability for improper
28 custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices

1 of sufficient duration, frequency and consistency that the conduct has become a traditional method
2 of carrying out policy.” *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

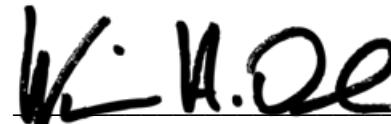
3 BART contends that “there is no evidence of a long-standing practice or custom which
4 constitutes the standard operating procedure of the BART Police Department or any other
5 decision-making official regarding use of excessive force or lack of medical care.” Mot. at 22
6 (citing Haight Decl.). Plaintiff does not address his *Monell* claim in his opposition, and includes
7 no allegations of a custom or practice in his complaint. Accordingly, BART is entitled to
8 summary judgment.

9 **CONCLUSION**

10 BART’s motion for summary judgment is GRANTED. Tougas’s motion is granted with
11 respect to the denial of medical care and denied in all other respects.

12 **IT IS SO ORDERED.**

13 Dated: January 17, 2017

14 
15 WILLIAM H. ORRICK
16 United States District Judge